

DECLARATION OF C. MICHAEL PFAU AND JULIE S. CHAMBERS

49. SWBT's Application attempts to paint the Texas xDSL market as being in its infancy.⁴⁵ SWBT fails to mention, however, that it has gone to extraordinary lengths to hinder the emergence of competition in the xDSL market. Given SWBT's obstructionism, its failure to demonstrate that it has complied with its statutory obligations pertaining to xDSL simply cannot be excused on the theory that it has not had sufficient time to accommodate the market demand for xDSL loops.

50. CLECs have been trying to claw their way into the xDSL market in Texas for almost two years, but SWBT has stubbornly refused to comply with its basic obligations to provide competitors with access to crucial network facilities and services. SWBT has taken unreasonable and unjustifiable positions in negotiations, abused the arbitration process, and reneged on agreements and promises made to regulators and competitors alike. Such conduct cannot be rewarded with a finding that SWBT has complied with the competitive checklist's requirements regarding xDSL loops.

A. SWBT Has Abused the Arbitration Process To Maintain its Competitive Advantages

51. The Application portrays the rising number of orders from CLECs for xDSL-capable loops as a sudden and unexpected development that SWBT has worked earnestly to accommodate. This revisionist account ignores the well-documented record of SWBT's intransigence in the face of CLEC-sustained efforts to exercise their rights under the Telecommunications Act and state law. SWBT successfully dragged the arbitration process well

⁴⁵ "Although SWBT filed its draft Section 271 application with the Texas PUC in March 1998," it says, "CLECs did not request Digital Subscriber Line ("xDSL")-capable loops in any significant quantity until September 1999." SWBT Application at 39.

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beyond the nine months contemplated by the Telecommunications Act⁴⁶ in a naked attempt to use its control of bottleneck facilities to prevent more nimble entrants from entering the market.

52. SWBT and other incumbent LECs have been under an obligation to provide xDSL-capable loops since 1996, when the Commission ruled in the *Local Competition Order* that xDSL loops are subject to the unbundling requirements of Section 251(c). Specifically, the Commission found that:

the local loop element should be defined as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises. This definition includes, for example, two-wire and four-wire analog voice-grade loops, *and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals.*⁴⁷

53. The limited number of orders for xDSL-capable loops in Texas certainly does not reflect the level of interest or effort expended by CLECs in entering this market. Covad, a leading “data CLEC,” or “DLEC,” began negotiating for an interconnection agreement with SWBT in May of 1998.⁴⁸ ACI (now known as Rhythms Links, Inc.) initiated negotiations in July of 1998.⁴⁹ After five months, however, their negotiations had gone nowhere, and both Covad and ACI requested arbitration under the supervision of the Texas PUC.⁵⁰

⁴⁶ See 47 U.S.C. § 252(b)(4)(C).

⁴⁷ *Local Competition Order* ¶ 380 (emphasis added).

⁴⁸ See Letter from John Rugo, V.P., Operations, Covad Communications Company, to Larry Cooper, Director, CLC Program, SBC Communications, Inc. (May 29, 1998), attached hereto as Attachment 20.

⁴⁹ See Direct Testimony of Eric H. Geis of ACI Corp., Petition of Accelerated Connection, Inc. d/b/a ACI Corp. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, Docket No. 20226 at 6 (filed Feb. 19, 1999) (“Geis Testimony”), attached hereto as Attachment 21.

⁵⁰ The Texas PUC consolidated these cases into a single arbitration in order to expedite the proceedings. See Arbitration Award, Petitions of Rhythms Links, Inc. and Dieca Communications, Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company, Docket Nos. 20226 and 20272 at 3, n. 2 (Nov. 30, 1999) (“Arbitration Award”), attached hereto as Attachment 22. The inability of Covad and ACI to reach interconnection agreements through voluntary negotiations is a telling sign of SWBT’s intransigence. Covad previously had negotiated several interconnection agreements with incumbent LECs, including

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54. In the arbitration, Covad and ACI documented a wide range of barriers that SWBT erected to block xDSL competition.⁵¹ Although Covad and ACI ultimately prevailed on the substantial majority of all claims raised in arbitration, SWBT used -- and continues to use -- the arbitration process as an instrument of delay and obstruction. Some of the most egregious examples of SWBT's abusive litigation tactics included the following:

- An internal e-mail sent one week after the opening of discovery in the arbitration proceeding urged scores of SWBT employees to immediately destroy any ADSL records not related to "current retail plans."⁵² This was nothing more than a thinly-veiled directive to dispose of evidence of SWBT's anticompetitive efforts to prevent competitors from obtaining xDSL loops.
- SWBT designated witnesses who did not have knowledge of the core issues in the arbitration proceeding, which caused the arbitrators to conclude that "SWBT's witnesses presented an inaccurate and incomplete picture of the facts, which is misleading at best and does not allow petitioners to ascertain the truth nor adequately prepare for the arbitration."⁵³

one with Pacific Bell, an SBC subsidiary. See Covad Arbitration Petition at 4. ACI had negotiated deals with every other major ILEC in the country. See Geis Testimony at 8 ("SWBT is the only ILEC with whom ACI has been forced into arbitration because of the prohibitive, inappropriate, unreasonable, and anti-competitive limitations and requirements being imposed by SWBT").

⁵¹ Specifically, they showed that SWBT: (1) refused to provide full pre-order loop qualification information; (2) impeded CLEC marketing of xDSL services; (3) failed to provide timely loop qualification information; (4) provisioned xDSL-capable loops greater than 17,500 feet in length only under individual case basis (ICB) arrangements; (5) improperly limited transmission speeds of xDSL services offered by CLECs; (6) refused to support xDSL technologies that SWBT did not use for its own retail customers; (7) retained sole discretion over spectrum management, and improperly used binder group management policies to reserve xDSL-capable loops for itself; (8) denied CLEC requests to deploy DSLAMs in remote locations; (9) imposed non-TELRIC based rates for xDSL loops and conditioning services; (10) required CLECs using non-standard xDSL technologies to indemnify SWBT for any interference with other services; and (11) unreasonably delayed provision of collocation space to competitors. See generally ACI Arbitration Petition; Covad Arbitration Petition.

⁵² See Bruce Hight, "Records at SBC Ordered Destroyed," Austin American-Statesman, November 2, 1999, at C1, attached hereto as Attachment 23. In recommending sanctions, the arbitrators noted that "at the very least," this document and SWBT's attempts to conceal it indicate "a general disregard on the part of SBC for matters pending in litigation at the Commission." Order No. 20, Order Ruling on SCI's and Covad's Motions and Amended Motions on Sanctions, ACI's and Covad's Motions to Declassify ACI Exhibit 153, SWBT's Motion to Reconsider and Reverse Bench Ruling, and SWBT's Limited and Conditional Offer of Proof Relating to ACI Exhibit 153, Docket Nos. 20226, 20272, at 33 (July 27, 1999) ("Sanctions Order"), attached hereto as Attachment 24.

⁵³ *Id.* at 26.

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- SWBT failed to produce hundreds of documents that went to the “central, critical issues” in the arbitration without any justifiable excuse.⁵⁴

55. Covad and ACI sought sanctions against SWBT for its abusive tactics.⁵⁵ In an April 1999 order directing SWBT to begin processing ACI and Covad’s orders immediately,⁵⁶ the arbitrators noted that SWBT’s efforts to obstruct discovery had slowed the efforts of Covad and ACI to obtain effective interconnection agreements.⁵⁷ SWBT further delayed implementation of an interim interconnection agreement by appealing the Interim Arbitration Order to the Texas PUC.⁵⁸ In July 1999, the Arbitration Panel imposed sanctions on SWBT for “failure to comply with the rules of discovery” and violating its “duty to bring forward the whole

⁵⁴ *Id.* at 30.

⁵⁵ *See id.* at 4, n.5.

⁵⁶ *See* Order No. 5, Interim Arbitration, Petition of Accelerated Connections Inc. d/b/a ACI Corp. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, Docket No. 20226; Petition of Dieca Communications, Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company, Texas PUC Docket No. 20272 (Apr. 26, 1999) (“Interim Arbitration Award”), attached hereto as Attachment 25. As explained below, SWBT cannot claim that the Texas PUC is “just now developing and adopting performance standards and measures for xDSL loop ordering and provisioning.” *BA-NY Section 271 Order* ¶ 317. While the Commission recognized that the NYPSC “did not begin to address xDSL issues until August 1999,” it is clear that the Panel had an *order* in place regarding xDSL provisioning by April 1999.

⁵⁷ Interim Arbitration Award at 2. The Arbitrators also voiced their concerns about “any unnecessary delays in these proceedings causing harm to ACI and Covad. SWBT’s position during the initial portion of the hearing on the merits in the[] proceedings has heightened the Arbitrators’ concerns over unnecessary delays.” *Id.*

⁵⁸ *See* SWBT Appeal of Arbitration Interim Order Investigation into Southwestern Bell InterLATA Telecommunications Market in Texas, Docket No. 16251; Operations Support Testing Relating to the Investigation into Southwestern Bell Telephone Company’s Entry into the InterLATA Communications Market in Texas, Project No. 2000 (May 12, 1999), attached hereto as Attachment 26. Interim agreements were finally reached with Covad and ACI only after Chairman Wood indicated that he would be “real, real happy” if the parties quickly agreed on terms and “Bell pulls its Appeal.” Petition of Accelerated Communications, Inc. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, Docket No. 20224; Petition of Dieca Communications, Inc., d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company, Docket No. 20272, Transcript of Proceedings Before the Public Utility Commission of Texas, Texas PUC at 103 (May 25, 1999), attached hereto as Attachment 27.

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truth.”⁵⁹ The Texas PUC ultimately ordered SWBT to pay almost \$850,000 to Covad and ACI for these abuses.⁶⁰

56. Despite implementation of interim interconnection agreements between SWBT and its competitors in June 1999, SWBT’s own data indicates that by the end of September, the company had provisioned only a handful of xDSL capable loops to CLECs.⁶¹ CLECs testified that SWBT dragged its feet in resolving numerous problems with its xDSL ordering process. For example, SWBT did not begin offering an electronic interface for placing xDSL orders until October 1999,⁶² and competitors’ manual orders were often rejected even where all mandatory fields were completed.⁶³ In one case, “Rhythms had to try five different entries to find the syntax that SWBT’s system would accept.”⁶⁴ Covad also described how SWBT required CLECs to submit xDSL loop orders manually or by facsimile in an elaborate 11-step process.⁶⁵

⁵⁹ Sanctions Order at 36.

⁶⁰ See Bruce Hight, *Southwestern Bell to Pay \$850,000 in Sanctions in Documents Dispute*, AUSTIN AMERICAN-STATESMAN, Sept. 24, 1999, at D8, attached hereto as Attachment 28. SWBT also stonewalled a congressional committee’s efforts to investigate the company’s anticompetitive conduct in the Texas xDSL market. See Bruce Hight, *SBC Won’t Release E-Mail to Lawmaker*, AUSTIN AMERICAN-STATESMAN, Sept. 22, 1999, at D1, attached hereto as Attachment 29 (describing SWBT’s refusal to release the documents to U.S. Representative Bliley, Chairman of the House Committee on Commerce). These sanctions were intended to cover legal expenses, but they did nothing to recompense the CLECs for lost competitive opportunities and profits. Sanctions Order at 34.

⁶¹ See Chapman Aff. ¶4.

⁶² *Id.* ¶ 10.

⁶³ Supplemental Affidavit of Eric H. Geis on behalf of Rhythms Links, Inc. in Response to the Commission’s Nov. 5, 1999 Memorandum, Investigation of Southwestern Bell Telephone Company’s Entry into the Texas InterLATA Telecommunications Market, Project No. 16251, Public Utility Commission of Texas at ¶13 (Nov. 22, 1999) (“Geis Supplemental Aff.”), attached hereto as Attachment 30.

⁶⁴ *Id.*

⁶⁵ See Affidavit of Michael Smith on behalf of Covad Communications Company in Response to Commission’s Request for DSL OSS Information During the November 4, 1999 Open Meeting, Investigation of Southwestern Bell Telephone Company’s Entry into the Texas InterLATA Telecommunications Market, Project No. 16251, Public Utility Commission of Texas ¶¶ 12-13 (Nov. 23, 1999) (“Smith Aff.”), attached hereto as Attachment 31. The requirement that the orders be faxed made it difficult for CLECs to “scale [their] orders for commercial volumes.” Affidavit of Jessica Lewandowski on behalf of Northpoint Communications, Investigation of Southwestern Bell Telephone Company’s Entry into the Texas

57. SWBT's loop qualification process was based solely on its own ADSL standards, making the commercial rollout of CLEC offerings cumbersome,⁶⁶ and SWBT created an internal system that allowed its own retail ADSL orders to be qualified much more quickly than CLEC orders.⁶⁷ SWBT's discriminatory practices also allowed it to dictate the location and timing of its competitors' xDSL rollouts, because it was able to force CLECs to wait 42 business days (58 calendar days, or nearly two months) for xDSL loops at central office not yet selected for deployment of SWBT's retail ADSL service.⁶⁸

58. The Arbitration Award intended to resolve xDSL issues was not issued until November 30, 1999.⁶⁹ The arbitrators found for the CLECs on 23 disputed issues, confirming that most of the arguments SWBT had pressed so vigorously for so long were utterly without merit. The arbitrators repeatedly rejected SWBT's claims in strong and unequivocal terms, stating that they were "not persuaded by SWBT's argument[s]," that SWBT provided "no compelling evidence," and that "SWBT's arguments...are not persuasive."⁷⁰ Furthermore, the arbitrators found that some of SWBT's practices "would only serve to impede rapid implementation of competitive xDSL services."⁷¹

InterLATA Telecommunications Market, Project No. 16251, Public Utility Commission of Texas ¶ 29 (Nov. 19, 1999) ("Lewandowski Aff."), attached hereto as Attachment 32.

⁶⁶ See Lewandowski Aff. ¶ 30.

⁶⁷ Affidavit of Anjali Joshi on behalf of Covad Communications, Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications market, Project No. 16251, Public Utility Commission of Texas ¶15 (Nov. 19, 1999) ("Joshi Aff."), attached hereto as Attachment 33. An example, according to SWBT Methods and Procedures, is the loop qualification data. For SWBT's retail ADSL service, this data has "already been gathered and populated into a database" so that "a significant number of SWBT orders can 'flow through' without loop qualification intervals" while CLECs "must wait up to 5 business days to receive loop qualification information data." *Id.*

⁶⁸ *Id.* ¶ 24.

⁶⁹ See generally Arbitration Award.

⁷⁰ *Id.* at 10, 13, 39, 47.

⁷¹ *Id.* at 16.

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59. That order upheld most of the positions taken by the CLECs and, among other things, ordered SWBT to modify its prior restrictions and:

- provide CLECs with clean copper loops on demand;
- drop its arbitrary length restrictions on xDSL loops for CLECs;
- allow CLECs to use any xDSL technology of their choosing;
- cut conditioning charges to a range of \$15 to \$25, drastically reducing SWBT's charges;
- give CLECs access to the same ordering and provisioning information used by SWBT;
- deliver information to CLECs on a timely, electronic basis so customers can order services in minutes rather than days;
- eliminate its efforts to segregate and reserve the best loops for its retail customers;
- eliminate procedures that forced CLECs to pay conditioning charges to remove interfering devices from loops left over after SWBT chose the best loops for itself; and
- give competitors access to raw data regarding the technical characteristics of loops in place of SWBT's inefficient loop qualification procedures.⁷²

60. While not acceding to the requirements of the Arbitration Award, SWBT made some concessions on the eve of the Texas PUC's vote on its Section 271 application on December 16, 1999.⁷³ SWBT's concessions, however, largely ignore the Arbitration Panel's concerns and do not even mention the November 30 Award. To the extent the concessions facially address concerns raised by the Arbitration Panel, they are inconsistent with the mandate

⁷² Many of these steps were consistent with the FCC's rulings -- which rejected similar arguments and practices by incumbents -- in the *UNE Remand Order*. See, e.g., *UNE Remand Order* at ¶¶162-99.

⁷³ Southwestern Bell Telephone Company's Affidavit of Carol Chapman, Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market, Texas PUC Project No. 16251 (Dec. 15, 1999) (Chapman Dec. 15 Aff.), attached hereto as Attachment 34.

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of the Award.⁷⁴ Furthermore, SWBT's concessions addressed some, but not all, of the arbitrator's concerns and in all events these promises of future modifications are an insufficient substitute for actual performance. These concessions not only failed to address fully the list of issues identified by the arbitrators, but they were mere promises, not binding obligations or demonstrated actions. Indeed, in some cases, they amounted to little more than pledges to undertake additional planning or development activities.⁷⁵

61. Having gained the Texas PUC's support for its long-distance application, SWBT resumed its attempts to obstruct Covad's and Rhythms' attempts to develop binding terms and conditions on which SWBT would provision xDSL-capable loops. On January 6, 2000, only three weeks after the Texas PUC's vote, SWBT challenged the Arbitration Award and proposed Interconnection Agreement,⁷⁶ arguing that it should not be required to develop enhanced pre-order Datagate and EDI interfaces within six months or create an "inventory" or database of loop information.⁷⁷

⁷⁴ For example, the Arbitration Award requires SWBT, without exception, to "provide a response to Petitioners' queries within four hours for those central offices that have been inventoried." Arbitration Award at 66. SWBT's "concession" to the Texas PUC, however, is that it will "respond to CLEC's requests by the end of business on the second business day in which SWBT received the request prior to Noon Central time." Chapman Dec. 15 Aff. at 4.

⁷⁵ See Investigation into SWBT Company's Entry into In-Region InterLATA Service and Section 271 of the Telecommunication Act of 1996, Project No. 16251; Operating Support Testing Relating to the Investigation in SWBT Company's Entry into the InterLATA Telecommunication Meeting in Texas; Project No. 20000; Section 271 Compliance Monitoring of SWBT Company of Texas, Project 20400, Transcript of Proceedings before the Texas PUC at 12-17 (Dec. 16, 1999), attached hereto as Attachment 35.

⁷⁶ See Comments of SWBT Company, Arbitration Award and Proposed Interconnection Agreement, Docket No. 20226 and 20272 Texas PUC, at 6 (Jan. 6, 2000) ("Appeal of Arbitration Award"), attached hereto as Attachment 36. Requesting a rehearing on the petition, SWBT took exception to cost-recovery provisions and loop qualification intervals discussed in the Arbitration Award. Moreover, SWBT urged the Texas PUC to refrain from requiring that it provide shielded cross-connects for all xDSL technologies, except for ADSL, and that the PUC interpret the Award as if it incorporates all germane portions of the *UNE Remand Order* cited in the Award.

⁷⁷ SWBT also argued that the Arbitration Award failed to: (i) take into consideration "current information" on SWBT's pre-orders processes; (ii) include a grace period; and (iii) fairly compensate SWBT for its costs.

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B. SBC Has Not Met its Burden To Demonstrate That it Has Fully Implemented its Obligation To Provide Nondiscriminatory Access to xDSL Loops

62. SWBT's failure to provide non-discriminatory access to xDSL-capable loops is not simply a reflection of the difficulties presented by establishing new procedures needed to handle commercial volumes of orders for new types of services. SWBT is racing to market with its own retail xDSL offerings, with no sign of the endemic delays facing CLECs that place wholesale orders for the same types of services. The simple fact is that SWBT *routinely* provisions xDSL loops for the benefit of its retail customers while CLECs are forced to submit to arduous and archaic procedures that result in serious delays -- when they can obtain xDSL loops at all. The only logical inference that can be drawn from the marked contrast between SWBT's performance for its retail xDSL operation and the services it provides to CLECs is that it is vigorously following through on its announced strategy to obtain an insurmountable competitive advantage by being first-to-market with xDSL services in Texas.

63. In order to satisfy Item 4 of the competitive checklist, SWBT must show that it is providing non-discriminatory access to loops "that are conditioned to transmit the digital signals needed to provides services such as ISDN, ADSL, HDSL and DS1-level signals."⁷⁸ As noted above, SWBT has been required to provide xDSL-capable loops since adoption of the *Local Competition Order* in 1996. Indeed, SWBT must provide access to any loop functionality requested by a CLEC unless the necessary conditioning is not technically feasible.⁷⁹ SWBT is also obliged to condition an existing loop for a CLEC's services, including xDSL, even if SWBT has never used the loop to provide similar services to its other customers.⁸⁰

⁷⁸ BA-NY Section 271 Order ¶ 268; *Local Competition Order*, ¶ 340.

⁷⁹ See BA-NY Section 271 Order ¶ 271; *BellSouth Louisiana II Order* 13 FCC Rcd 20599; *Local Competition Order* ¶ 380.

⁸⁰ See BA-NY Section 271 Order ¶ 271.

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64. In the *BA-NY Section 271 Order*, the Commission described how BOCs must demonstrate that they provide non-discriminatory access to xDSL-capable loops.⁸¹ The Commission clearly announced that all future applicants for Section 271 approval must make a “separate and comprehensive evidentiary showing with respect to the provision of xDSL-capable loops.”⁸² The Commission identified two ways a BOC might demonstrate that it provides non-discriminatory xDSL provisioning. The first is for the BOC to show that it has established a “fully operational separate advanced services affiliate.”⁸³ As is discussed below and in AT&T’s Brief in Opposition, SWBT’s advance services affiliate is *neither* fully operational *nor* separate. Thus, its data affiliate cannot meet the Commission’s requirements in this regard.

65. In the absence of a fully operational separate affiliate, SWBT must present evidence of non-discriminatory access through the submission of performance data. As the Commission explained:

[W]e emphasize our strong preference for a record that contains data measuring a BOC’s performance pursuant to state-adopted standards that were developed with input from the relevant carriers and that include clearly-defined guidelines and methodology. Accordingly, we encourage state commissions to adopt specific xDSL loop performance standards measuring, for instance, the average completion interval, the percent of installation appointments missed as a result of the BOC’s provisioning error, the timeliness of order processing, the installation quality of xDSL loops provisioned, and the timeliness and quality of the BOC’s xDSL maintenance and repair functions.⁸⁴

66. As to the types of performance data it would find most persuasive, the Commission set forth its expectation that:

⁸¹ See *id.* ¶ 330, n.1032 (“future applicants will have a clear picture of the evidentiary showing we would expect for a showing of checklist compliance with respect to xDSL capable loops”).

⁸² *Id.* ¶ 330. When the Commission said it expected BOCs to make a “separate” showing, it was referring to the need for evidence relating specifically to the provisioning of xDSL-capable loops rather than overall loop performance. The Commission requires specific evidence on xDSL performance because it recognizes that provisioning of xDSL-capable loops is more complicated than providing voice grade loops. See *id.* ¶ 319.

⁸³ *Id.* ¶ 330.

⁸⁴ See *id.* ¶ 334.

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- In circumstances where there is an appropriate retail analogue, the BOC must demonstrate, “preferably through the use of state or third-party verified performance data, that it provides xDSL-capable loops to competitors either in substantially the same average interval in which it provides xDSL service to its retail customers;”
- Where there is no retail analogue, the BOC must provide comparable data showing that it offers installation intervals that offer competing carriers a meaningful opportunity to compete;
- The BOC must establish, “again through defined performance measures, that it meets substantially the same number of installation appointments for the customers of competing carriers that it meets for its retail customers or that the level of missed appointments is sufficiently low to offer competitors a meaningful opportunity to compete;”
- The BOC must further prove “that the quality of the loops provisioned to competing carriers is substantially the same as the quality of the lines used for the BOC’s provision of retail advanced services or that the level of quality is sufficiently high to permit competitors to compete meaningfully, . . . [and] that the BOC performs maintenance and repair functions for competitors’ xDSL loops in substantially the same time and manner as it does for its retail lines;” and
- The BOC must demonstrate that it provides competing carriers “nondiscriminatory access to the pre-ordering and ordering OSS functions associated with the provision of xDSL loops, including access to loop qualification information and databases, . . . through evidence of either extensive commercial experience or third-party testing.”⁸⁵

67. SWBT’s claim that it meets the above requirements is patently false. SWBT contends it has met the burden of showing that it meets (and will continue to meet) CLECs’ demand for xDSL-capable loops in several ways. Specifically, it points to: (1) successful provisioning of xDSL loops requested to date; (2) Telcordia’s testing of SWBT’s capabilities; (3) creation of a separate affiliate; (4) recent findings by the Texas PUC; (5) heightened performance guarantees for xDSL and nascent services; and (6) SWBT’s offer of special discounts on unbundled loops. However, SWBT provides no evidence upon which this Commission can conclude that SWBT has provided the “separate and comprehensive” showing outlined in the *BA-NY Section 271 Order*.

68. Three of the bases relied upon by SWBT do not require extensive comment:

- SWBT's claim that the "surrogate line sharing discounts it will provide pursuant to the SWBT Ameritech merger demonstrate nondiscriminatory access to xDSL loops"⁸⁶ is simply irrelevant. The fact that SWBT may offer discounted *pricing* offers no information regarding its ability to *provision* xDSL-capable loops in a nondiscriminatory manner.
- SWBT's reference to potential future 'backsliding' penalties, which are themselves insufficient to prevent backsliding, again says nothing about its current ability to provide nondiscriminatory access to xDSL capable loops, nor does it address at all the current inability of UNE-P-based carriers to obtain or develop data service options.⁸⁷
- SBWT's reference to findings of the Texas PUC and its assertion that because of an intensive "collaborative" effort in November and December, it has "committed to and then implemented" a series of enhancements to its pre-ordering, ordering and provisioning functions⁸⁸ is a mere promise regarding its future behavior. It provides no basis for finding that SWBT did, in fact, as of the date of its application, provide nondiscriminatory access to xDSL-capable loops.

69. None of SWBT's three remaining grounds demonstrates that it has met its obligations to provide nondiscriminatory access to xDSL loops. As discussed in detail below, Telcordia's xDSL testing is patently inadequate, SWBT has insufficient commercial experience to show it provides non-discriminatory access to xDSL loops, and SWBT's data affiliate is neither fully operational nor sufficiently separate to ensure competitive parity.

1. The Telcordia Review of SWBT's xDSL Loop Provisioning Is Patently Inadequate

70. SWBT has failed to demonstrate through independent testing that it is capable of provisioning xDSL-capable loops to competitors on a non-discriminatory basis. Telcordia, the company selected to oversee the carrier-to-carrier test of SWBT's OSS systems, simply did not

⁸⁵ *Id.* ¶ 335.

⁸⁶ SWBT Application at 44-45.

⁸⁷ *BA-NY Section 271 Application*, CC Docket No. 99-295, Evaluation of the United States Department of Justice at 36-40 (filed Nov. 1, 1999); *id.* n.102 (performance assurance plans have "proved to be more effective at *maintaining* adequate wholesale performance once the necessary new access arrangements have been put in place and a benchmark of acceptable performance has been established")(emphasis in original).

analyze a sufficient number of xDSL orders to support *any* conclusion regarding SWBT's ability to provision xDSL loops for CLECs. Indeed, because SWBT's efforts to delay or obstruct regulatory action on xDSL were so successful, the key performance measurements for xDSL provisioning were not even established by the Texas PUC until after Telcordia's xDSL review was finished.⁸⁹ Moreover, to the extent Telcordia's limited review has any probative value, it tends to show that CLECs face significant difficulties in ordering xDSL-capable loops, even in small volumes.

71. Two major deficiencies in Telcordia's xDSL review are readily apparent. First, Telcordia's review was conducted during the summer of 1999,⁹⁰ but SWBT admits that CLECs did not request substantial numbers of xDSL loops until late fall.⁹¹ Second, CLECs were required to have collocated facilities with SWBT in order to issue orders for xDSL-capable loops. Thus, only two data CLECs were eligible to participate in the Telcordia xDSL review, and only one actually did so.⁹² Critically, Telcordia's review covered only nine orders for ADSL loops and seven orders for ISDN loops, which were used as a "surrogate" for SDSL loops, with

⁸⁸ SWBT Application at 41.

⁸⁹ Even today, the performance measurements relating to xDSL are not final. The Texas PUC adopted interim xDSL performance measurements in the Section 271 proceeding, without providing parties an opportunity to comment on them, and directed that final performance measurements would be developed in the Covad/Rhythms arbitration. The schedule for development of those measurements in the arbitration has been delayed, with filings now scheduled for January 31.

⁹⁰ See TFR at 3-4.

⁹¹ See Chapman Aff. ¶ 4-5 ("[T]he actual number of CLEC orders during the testing period was small [G]rowth began in September of 1999 with the provisioning of 31 new xDSL loops").

⁹² See TFR at 75, Ham Aff. ¶ 280. SWBT's Ms. Ham suggests that the small number of xDSL orders was a "result of the limited number of qualifying CLECs and their internal resources, not [obstructionist tactics] on the part of SWBT," (Ham Aff. ¶ 280) but she ignores SWBT's well-documented role in blocking earlier CLEC efforts to obtain collocation arrangements. See Interim Arbitration Award at 2 (noting that "unnecessary delays in these proceedings are causing harm to [the collocation efforts of] ACI and Covad.").

only two loops of each type actually provisioned.⁹³ Telcordia did not even comment on the fact that only two of nine planned ADSL loops were actually provisioned.⁹⁴

72. This is wholly inconsistent with the Common Carrier Bureau's guidance letter to BOCs on third party testing, which stated that an independent third evaluation should "test significant volumes of xDSL orders."⁹⁵ Indeed, SWBT's Ms. Chapman acknowledges that "[b]ecause the actual number of CLEC orders during the testing period was small . . . Telcordia had insufficient data to draw statistically significant conclusions about SWBT's provisioning of DSL-capable loops."⁹⁶ Moreover, Telcordia's Final Report states only that SWBT has "processes and business rules in place . . . for ADSL."⁹⁷ It did not evaluate whether SWBT could handle "reasonably foreseeable demand" for ADSL loops as contemplated by the Common Carrier Bureau⁹⁸ and drew no conclusions at all about SDSL.⁹⁹

73. In short, Telcordia did not conduct an "end-to-end" examination of xDSL loop provisioning.¹⁰⁰ Thus, Ms. Ham's claim that SWBT "passed" Telcordia's xDSL testing¹⁰¹ is meaningless. Ms. Chapman is more candid, admitting that Telcordia recommended more xDSL testing and that the Texas PUC found a wide variety of deficiencies after Telcordia's evaluation had ended.¹⁰²

⁹³ See TFR at 76, 78.

⁹⁴ See TFR at 78.

⁹⁵ Letter from Lawrence E. Strickling, Common Carrier Bureau Chief, to Nancy E. Lubamersky, Executive Director of Regulatory Planning, U S West, September 27, 1999 ("CCB Letter") at 1, 3, attached hereto as Attachment 37.

⁹⁶ Chapman Aff. ¶ 5.

⁹⁷ TFR at 77.

⁹⁸ See CCB Letter at 1.

⁹⁹ See TFR at 78.

¹⁰⁰ See TFR at 74, 77 (noting exclusion of maintenance and repair and billing functions from xDSL testing and absence of monitoring for pre-ordering aspects of SDSL provisioning); *see also* CCB Letter at 4 (expressing Common Carrier Bureau's view that independent evaluation should include end-to-end testing of OSS processes).

¹⁰¹ See Ham Aff. ¶¶ 264, 279

¹⁰² See Chapman Aff. ¶¶ 5-6.

74. Moreover, the results of Telcordia's review highlight a number of shortcomings in SWBT's OSS systems. For example, the Telcordia Final Report states that "ADSL-capable loops needed to be qualified prior to an order being issued," but the loop qualification process was not performed until SWBT received an LSR.¹⁰³ Thus, under the process in place at the time of the Telcordia review, CLECs had to submit an order before obtaining loop qualification information, and their orders had to specify the data speed the customer desired. If the loop was not xDSL-qualified, or not qualified at the speed requested, then the order would be rejected. This meant that CLECs could often end up selling customers a service they could not provide.

75. Similarly, the Telcordia Final Report describes several manual steps in SWBT's xDSL provisioning procedures for competitors, including the use of faxed forms and manual comparison of qualification data to service request specifications.¹⁰⁴ During the arbitration proceeding on xDSL issues, CLECs showed that these manual processes were inferior to the electronic or mechanized systems available to SWBT's retail operation. For instance, they compared the mail or fax orders CLECs were required to submit to the e-mail processes designed for SWBT's retail unit and showed how that gave SWBT an unfair edge in establishing service for end users.¹⁰⁵

76. It is true that some of the procedures that interfered with the ability of CLECs to obtain xDSL-capable loops during the testing period have been addressed through the arbitration process or in negotiations with SWBT.¹⁰⁶ But even if SWBT intends to implement the changes required under the Arbitration Award or negotiated agreements, the necessary modifications to

¹⁰³ TFR at 75.

¹⁰⁴ See TFR at 75.

¹⁰⁵ See Arbitration Award at 56-57 (summarizing testimony).

¹⁰⁶ See, e.g., *id.* at 65, 74 (requiring SWBT to provide CLECs with same real-time loop make-up information available to retail unit in place of pre-qualification process); Chapman Aff. ¶ 5 (listing changes imposed by arbitrator or to which SWBT is "committed" to implement).

SWBT's provisioning systems have not been tested. Thus, SWBT is again asking the Commission -- and its competitors -- to rely on promises that OSS systems crucial to the provisioning of xDSL-capable loops will provide improved performance in the future. This is inconsistent with the Commission's prior orders and the express terms of Section 271.¹⁰⁷

77. Given the fact that data CLECs have been trying to obtain access to xDSL facilities and services at least since mid-1998, there is no basis to claim that CLECs are responsible for the lack of third party test data. Indeed, as shown above, SWBT has used virtually every means imaginable to avoid complying with its obligation to unbundle xDSL-capable loops for its competitors. As a result, SWBT has only itself to blame for its inability to produce commercial usage data -- or meaningful test data -- showing that it is capable of providing CLECs with non-discriminatory access to xDSL-capable loops.

2. SWBT Has Submitted No Probative Evidence of Commercial Usage

78. The Commission has correctly emphasized that actual commercial usage is the most probative evidence of a BOC's ability to provide nondiscriminatory access.¹⁰⁸ As noted in the *BA-NY Section 271 Order*, a BOC must demonstrate "extensive commercial experience" before its performance data can be relied upon to prove its xDSL provisioning is non-discriminatory.¹⁰⁹ SWBT has no such experience.

79. SWBT claims that it has developed "a track record of commercial performance" based on its provisioning of 944 xDSL loops between *October and December 1999*. SWBT claims that its performance "[i]n connection with these orders" demonstrates that it has achieved parity in the delivery of xDSL services to competitors. This claim is misleading. Contrary to its representations in the Application, SWBT's showing is *not* premised on data derived from 944

¹⁰⁷ See, e.g., 47 USC § 271(d)(3); *BA-NY Section 271 Order* ¶ 137; *Michigan Order* ¶ 55.

¹⁰⁸ *Michigan Order* ¶ 138.

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xDSL loops provisioned from October to December. Instead, the performance data discussed in the Dysart Affidavit and cited as support in the brief was collected in August, September and October. No usable data have been presented for November and December.¹¹⁰ As noted in the Chapman Affidavit, in Texas, SWBT provisioned 16 xDSL loops for CLECs through September and 123 in October.¹¹¹ Thus, the total number of xDSL loops provisioned during the period SWBT uses to assess its performance is no more than 139,¹¹² a quantity that is far short of “extensive commercial usage.” In addition, data was reported in only one category for August.¹¹³ Thus, nearly all of the performance data in the SWBT Application is based on only two months worth of observations.¹¹⁴

80. Indeed, the volume of commercial usage is so small that SWBT concludes the resulting performance data cannot serve as a foundation for any “statistically valid” conclusions.¹¹⁵ As Mr. Dysart explains, for purposes of evaluating whether SWBT’s performance is sufficient to demonstrate compliance with the competitive checklist, the Texas PUC considered sample sizes of ten or more. If SWBT stands by its policies with regard to small sample size, which AT&T finds inappropriate,¹¹⁶ it cannot simultaneously claim that it has enough data to draw statistically valid conclusion for the vast majority of xDSL performance

¹⁰⁹ *BA-NY Section 271 Order* ¶ 335.

¹¹⁰ Although SWBT submitted November performance data, SWBT acknowledges it had not been validated. SWBT Application at 16; Dysart Aff. ¶ 79. SWBT did not submit any data for December.

¹¹¹ The number of xDSL-capable loops provided by SWBT throughout its region and in Texas is broken down on a per month basis in Chapman’s Affidavit. Chapman Aff. ¶¶ 4-5.

¹¹² The data points for certain measurements, such as loop make-up queries, may exceed 139 because competitors may have made more queries than resulted in orders, or competitors may have made queries in September or October that did not lead to loop installation until November or December.

¹¹³ Performance Measurement 57, which measures average response time for loop make-up information, is the only xDSL performance measurement for which there is three months of data.

¹¹⁴ SWBT Application at 16.

¹¹⁵ Dysart Aff. ¶ 18; *see e.g.*, Dysart Aff. ¶¶ 333, 474.

measurements. For example, in September and October 1999, there were fewer than 10 data points in 91 of the 120 potential performance measurement categories.¹¹⁷ Of the remaining 29 results that contained 10 or more data points, SWBT missed parity in six performance measurement tests (*i.e.*, one out of every five).

81. One of the metrics lacking sufficient data is the measurement for average installation intervals. Indeed, SWBT concedes that the volume of orders is too small to make any determination of whether SWBT installs xDSL-capable loops in a non-discriminatory manner.¹¹⁸ The Commission has previously emphasized the importance of data on installation intervals, calling this information “fundamental to a BOC’s demonstration of nondiscriminatory access.”¹¹⁹ Without sufficient data on this key indicator of performance, the Commission cannot conclude that SWBT provisions xDSL-capable loops in a nondiscriminatory manner.

82. And even if SWBT had been able to collect more data on its performance last fall, it would not have been able to prove that it provides non-discriminatory provisioning, because the performance measures applicable to xDSL remain unsettled. The November 1999 Arbitration Award directed that all performance measures and penalties adopted as part of the Section 271 proceeding, with certain minor exceptions, “shall be incorporated into” the interconnection agreements with CLECs in Texas, and it encouraged the parties to negotiate

¹¹⁶ AT&T’s position on this issue is discussed in detail in the Declaration of C. Michael Pfau and Sarah DeYoung regarding performance measurements.

¹¹⁷ There are 15 xDSL-related performance measurements. *See* Dysart Aff., Attachment B, Performance Measurement Tracking Charts 55.1-01; 55.1-02; 57-01; 58-09; 59-08; 60-08; 60-08, >30 day measurement; 60-08, >90 day measurement; 61-08; 62-09; 63-09; 65-08; 67-08, Dispatch measurement; 67-08 No Dispatch measurement; and 69-08. These xDSL performance measurement are subcategorized by geographic markets, of which there are four in Texas. Accordingly, each month would render 60 performance measurements from which a parity conclusion could be drawn, and for a 2 month period, there would be 120 performance measurements.

¹¹⁸ SWBT 271 Application at 40; Dysart Aff. ¶ 332-33 (“such small data is not a statistically reliable prediction of future performance”).

¹¹⁹ *Second BellSouth Louisiana Order* ¶ 125.

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additional standards.¹²⁰ Under the terms of the Arbitration Award, proposed xDSL performance measures were supposed to be filed on December 30, 1999, but the deadline has since been extended to January 31, 2000. Thus, even at this late date, the performance metrics used to measure SWBT's xDSL performance are still in flux.

83. When examined closely, the Application and its supporting materials do not even come close to showing that SWBT has met its statutory obligations pertinent to xDSL. Many of the measures that SWBT relies upon to demonstrate checklist compliance have not yet been tested, others have not yet even been implemented, and still others are deeply flawed. Although Bell Atlantic-New York's successful Section 271 application suffered from certain shortcomings related to xDSL,¹²¹ at least three critical distinctions need to be borne in mind:

84. First, whatever the merits of the Commission's approach in the *BA-NY Section 271 Order*,¹²² the Commission explicitly stated that future applicants would be required to make a "separate and comprehensive" showing on xDSL and would not be able to rely on aggregate performance data that fails to show whether competitors are receiving non-discriminatory treatment in wholesale xDSL services.¹²³ Second, the decision to make a one-time-only exception on xDSL issues for Bell Atlantic-New York was based on the Commission's belief that penalizing the company for failing to show that it was providing non-discriminatory treatment with respect to xDSL provisioning would be unfair in view of the very recent emergence of CLEC demand.¹²⁴ In Texas, by contrast, the delays in high-volume CLEC orders

¹²⁰ Arbitration Award at 105.

¹²¹ On December 22, 1999, the Federal Communication Commission approved BA-NY's bid to enter the intrastate InterLATA market in New York State. *See generally BA-NY Section 271 Order*.

¹²² AT&T is pursuing an appeal of the *BA-NY Section 271 Order*.

¹²³ *See BA-NY Section 271 Order* ¶ 330 (noting that "future applicants under Section 271, unlike this applicant, [will need to make] a *separate and comprehensive evidentiary showing with respect to the provision of xDSL-capable loops ...*").

¹²⁴ *See id.* ¶ 317.

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for xDSL-related facilities and services are attributable to SWBT's own prolonged and persistent efforts to hinder xDSL competition. Third, SWBT is *even now* litigating to prevent implementation of the measures deemed necessary by the PUC in Texas to reach parity in xDSL provisioning.¹²⁵

VI. SWBT'S CREATION OF A SEPARATE AFFILIATE FOR ADVANCED SERVICES DOES NOT DEMONSTRATE CHECKLIST COMPLIANCE

85. The transparently anticompetitive effects of SWBT's xDSL practices are not addressed by the creation of SBC Advanced Solutions Inc. ("ASI") as a "separate affiliate" to provide advanced services. ASI is *not* "fully operational," and it is *not* "separate" in any meaningful sense. ASI's relationship with SWBT will *not* ensure parity in the ordering and provisioning of wholesale xDSL inputs, and ASI's existence does nothing to strengthen SWBT's Application for relief under Section 271. If the creation of ASI is allowed to serve as a substitute for hard proof that SWBT is willing and able to provide xDSL facilities and services on a non-discriminatory basis, ASI will continue to enjoy preferential access to SWBT's internal systems and other resources at the expense of fair competition among xDSL providers. Thus, the creation of ASI does not demonstrate checklist compliance.

A. ASI Is Not "Fully Operational"

86. The Commission has expressed a willingness to consider "proof of a *fully operational* separate affiliate" as a potential means of demonstrating that a BOC provisions unbundled xDSL-capable loops on a nondiscriminatory basis.¹²⁶ As of the date of SWBT's application, the company has no "fully operational" separate affiliate in Texas. SWBT admits

¹²⁵ See generally Appeal of Arbitration Award.

¹²⁶ BA-NY Section 271 Order ¶ 330 (emphasis added).

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that ASI is currently providing services only in Arkansas and is not expected to commence operations in Texas until February.¹²⁷

87. Even after ASI commences operations in Texas, it will not be “fully operational” on a separate basis. ASI is purportedly being structured in compliance with the merger conditions adopted in the *SBC/Ameritech Merger Order*,¹²⁸ and the separation requirements established in that order will not be fully implemented for some time. For example, under the terms of the *SBC/Ameritech Merger Order*, ASI will not be required to use the same interfaces, OSS processes, and other procedures used by unaffiliated entities to obtain loop information until at least April.¹²⁹ Similarly, ASI is currently permitted to obtain “network planning, engineering, design, and assignment services,” including associated “systems and databases,” on an “exclusive” -- *i.e.*, discriminatory -- basis,¹³⁰ and other transitional exceptions abound.¹³¹

88. ASI’s continued use of SWBT resources on an exclusive or preferential basis is fatal to SWBT’s efforts to show it has created a separate and fully-operational affiliate, because the entire point of requiring creation of an affiliate is to ensure that unaffiliated carriers have an equal opportunity to compete for customers of the BOC’s retail xDSL business.

¹²⁷ See Brown Aff. ¶¶ 5, 37.

¹²⁸ See SBC Brief at 43; Brown Aff. at ¶ 5.

¹²⁹ See *SBC/Ameritech Merger Order*, App. C, at ¶ 3a (condition effective 180 days after merger closing date); “SBC Reports Strong Third-Quarter Earnings,” SBC News Release (Oct. 27, 1999) (merger closed October 8, 1999), attached hereto as Attachment 38.

¹³⁰ See *SBC/Ameritech Merger Order*, App. C, at ¶ 3c (condition effective 180 days after merger closing date).

¹³¹ See, *e.g.*, *SBC/Ameritech Merger Order*, App. C, at ¶¶ 3(d) (“interim line sharing . . . on an exclusive basis); 3(e) (transfers of advanced services equipment . . . on an exclusive basis”), 3(h) (receipt and processing of Advanced Services-related trouble reports and performance of related trouble isolation “on an exclusive basis”), 3(n)(3) (continued provision of service to “embedded customers”), 8 (interim line sharing).

B. ASI Has Not Been Shown to be -- And Is Not -- Sufficiently Separate from SWBT

89. Even if ASI were fully operational (as it is not), the information available about ASI and its relationship with SWBT provides no reason to expect that moving SWBT's retail xDSL business into this affiliate will prevent discriminatory treatment of unaffiliated CLECs. Indeed, there is no basis -- other than wishful thinking -- for believing that the mere existence of ASI will ensure a "level playing field" between affiliated and unaffiliated providers of xDSL services.

90. ASI will not "operate independently" of SWBT. To the contrary, ASI will be dependent upon SWBT for virtually all of its functions. SWBT's website lists four dozen separate contracts for services SWBT provides to ASI, ranging from "purchasing and contracting" and "customer services support" to "network planning and engineering" and "technical support services."¹³² Some of these arrangements are transitional, but most are not. In the aggregate, they demonstrate the utter inability of ASI to exist "independently" of SWBT.¹³³

91. ASI and SWBT will not deal with each other at arm's length. The many existing contracts between SWBT and ASI bear none of the badges of arm's-length bargaining. For example, one contract calls for SWBT to perform services described only as "circuit provisioning, installation and repair of CPE equipment [sic], Tier II customer level support, Tier I and Tier II support for Complementary Service Providers, identification of trouble and

¹³² See "Non-Tariffed Services Provided by Southwestern Bell Telephone Company to SBC Advanced Solutions, Inc.," <www.sbc.com/PublicAffairs/PublicPolicy/Regulatory/swb2asbcnts.html> (accessed Jan. 28, 2000).

¹³³ As explained above, SWBT's assertion that ASI's near-total dependence may diminish in time does not strengthen the separate affiliate argument, because it merely underscores that ASI is not "fully operational." Moreover, the record contains no evidence that could permit the Commission to find that ASI will ever "operate independently" of SWBT.

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customer interaction, etc. to Buyer [ASI].”¹³⁴ The entire contract runs less than three pages, even with a signature block that occupies most of one page and abundant white space throughout the agreement. The contents of the contract are almost entirely boilerplate. Aside from the title, a bare-bones price schedule,¹³⁵ and the above-quoted cursory description of services to be rendered, this contract is identical to the agreements covering real estate management, interim installation and management, public relations, and general ledger support (among many others).¹³⁶

92. In contract after contract,¹³⁷ it is evident that ASI and SWBT treat the need to negotiate with each other over business transactions as a mere formality. The cookie-cutter approach evident in the ASI-SWBT contract documents would never be applied to such disparate topics in the context of genuine arm’s length dealings.¹³⁸ For example, a contract between SWBT and AT&T addressing similar services would include a host of terms and conditions intended to protect each party’s interests in the event of unforeseen contingencies. No one who is familiar with the difficulties encountered in negotiating an agreement between SWBT and its unaffiliated CLEC competitors on such complex subjects as network engineering, circuit

¹³⁴ General Services Agreement, Contract No. 989965, Schedule 179, attached hereto as Attachment 39.

¹³⁵ Some pricing provisions simply give an hourly rate for ASI’s use of different categories of SWBT employees; other pricing provisions are per task or monthly rental rate per item.

¹³⁶ See General Services Agreement, Contract No. 989965, Schedules 025, 174, 051, and 117, attached hereto as Attachments 40 through 43.

¹³⁷ Technically, these various agreements are structured not as separate contracts but as “schedules” to a “General Services Agreement,” attached hereto as Attachment 44. That agreement, too, lacks the detail to be expected in genuine arm’s length dealings.

¹³⁸ One possible explanation is that SWBT also performs “contract negotiation support” for ASI. See General Services Agreement, Contract No. 989965, Schedule 039, attached hereto as Attachment 45. At a minimum, the fact that ASI apparently needs assistance with contracting and procurement raises serious questions about its ability to bargain on anything approaching an arm’s length terms with SWBT.

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provisioning, and customer support would take the flimsy documentation of the purportedly arm's length transactions between SWBT-ASI relationship seriously.¹³⁹

93. Accordingly, no reasonable observer could conclude that the SWBT-ASI relationship will prevent discrimination against competitors. A number of the "transitional" examples of exclusive (and therefore discriminatory) dealings have been mentioned above. In addition, only time will tell whether some of the services SWBT theoretically makes available to all CLECs on a non-discriminatory basis will be uniquely designed to benefit ASI. Worst of all - and most inconsistent with the Commission's expectations of non-discriminatory policies designed to ensure a "level playing field," *access to a frequency-divided SWBT loop will be available only to ASI and other carriers who are willing to perpetuate SWBT's monopoly in voice service and barred to carriers using UNE-P*. SWBT's policy of installing and maintaining splitters and separating low-frequency and high-frequency channels is blatantly anticompetitive when the benefits of such access to the loops and associated electronics are denied to carriers -- such as AT&T -- who use UNE-P to provide voice service in competition with SWBT.

VII. CONCLUSION

94. The xDSL situation in Texas is characterized by a telling duality: SWBT's xDSL business is developing rapidly and successfully, while SWBT's competitors and would-be competitors struggle to surmount a never-ending array of SWBT-imposed obstacles. The tactics vary and the explanations change, but the pattern remains the same.

95. AT&T shares the Commission's enthusiasm about the myriad benefits advanced data services can bring to our society and our economy. But the xDSL market in Texas is

¹³⁹ Further evidence of the lack of arm's length dealings between SWBT and ASI can be found in the fact that ASI simply opted to enter into SWBT's standard interconnection agreement, without obtaining any modifications to that form contract.

developing in a way that will not serve the long-run goals of consumers, or realize the vision of the Telecommunications Act. SWBT must not be permitted to monopolize the data market and strengthen its grip on the voice market. Immediate and decisive action by the Commission is needed to set the xDSL market in Texas back on the right path. SWBT must be required to promptly support voluntary line sharing by carriers using UNE-P, immediately discontinue its policy of withdrawing its xDSL service upon a customer's selection of a competitive local service provider and demonstrate non-discriminatory delivery of xDSL-capable loops before relief under Section 271 is granted.

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I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on January 26, 2000



FCC DOCKET CC NO. 00-4

I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on January 26, 2000

Julie S Chambers